IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.64 OF 2005

The Commissioner of Income Tax
Central III, Mumbai Appellant

vs

Narendra D.Desai .. Respondent

Mr.Pankaj Kapoor for Appellant

CORAM : F.I.REBELLO AND
R.S.MOHITE, JJ

DATED : 4TH DECEMBER, 2007

P.C.

1. The revenue has preferred this appeal against the order dated 28th May, 2002 . The issue for consideration before the learned Tribunal was whether the receipt received by the assessee from the General Electric Company USA (GE) for agreeing to refrain from carrying on competing business under a restrictive covenant is income exigible to tax ? After going through the various facts the tribunal noted that the amount received is capital receipt and is not liable to tax. Before the tribunal, the contention of the revenue was that the amount in question cannot be considered to be capital receipt because existing income earning apparatus was not destroyed or impaired. In para 11 of the judgment, the learned tribunal has referred to the amendment of section 28 by Finance Act, 2002. Sub-clause (va) was introduced with effect from 1st April, 2003. The relevant portion reads as under :

. " (va) any sum whether received or receivable in cash or kind under a agreement for-

(a) not carrying out any activity in relation to any business; or

(b) ....."

The learned tribunal considered the Memorandum explaining the Provision in the Finance Bill, 2002 and quoted the following :-

" MEASURES TO CURB TAX AVOIDANCE

New provisions for taxing the receipts in the nature of non-compete fees and exclusivity rights.

The tribunal noted that this amendment propose to insert a new provision in the Income Tax Act, 1961 for charging to tax any sum received or receivable in cash or in kind under an agreement for not carrying out activity in relation to any business or not to share any know-how, patent, copyright,licence, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture or proceesing of goods or provision for service under the head profit and gains of business of profession.

The amendment has come into force from 1st April, 2003 and accordingly will apply in relation to the assessment year 2003-2004 and subsequent years.

2. After considering these aspects, the tribunal

held that this amendment is operative from 1st April, 2003. It was not made retrospective. As such it can be said that in the year under consideration the amount received under an agreement for not carrying out any activity in relation to business was not exigible to tax.

3. As to whether it will attract capital gains, reliance was placed on Instruction No. 1964 dated 17.3.1999 issued by CBDT. It was stipulated in the said Instruction that where the capital asset transferred is in the nature of a right to manufacture produce or process an article or thing, recourse to section 55 (2) can be made only from assessment year 1998-99 in respect of any consideration received for the transfer thereof which includes extinguishments or curtailment of such right. Section 55 (2) (a) was amended with effect from 1.4.1998. Considering that it was held in the year under consideration, it would not be applicable and since the cost of acquisition was nil it was not exigible to capital gains tax. In the light of that, the issue was decided in favour of assessee and against the revenue.

4. In our opinion, in so far as the issue pertaining to prospective and restrospective covenants, we do not find that there is any error committed by the tribunal in arriving at the conclusion. The amendment was prospective and consequently would not apply in relation to the assessment year under consideration.

5. Similarly, considering the finding in so far as capital gains is concerned, we also find that there is no error of law and consequently the questions of law as framed would not arise. Appeal is accordingly dismissed.

(F.I.Rebello, J)

(R.S.Mohite, J)

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